Supreme Court, U. S.
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MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant,

v.

VIRGIL B. STARNES,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

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SIR SPEEDY INSTANT PRINTING, SAN ANTONIO

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AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant,

v.

VIRGIL B. STARNES,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Civil Appeals of Texas, Tenth Supreme Judicial District, entered on October 17, 1974, affirming the judgment of the 74th Judicial District Court of McLennan County, Texas, overruling appellant's plea of privilege to be sued in the county of its residence and principal office, Dallas County, Texas, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas for the Tenth Supreme Judicial District is reported at 515 S.W. 2d 354, and is attached hereto, together with other pertinent orders of the lower courts and appellant's Notice of Appeal, as Appendix A.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on October 17, 1974. A timely motion for rehearing was filed on October 31, 1974, and overruled on November 21, 1974. Appellant filed a timely application for writ of error with the Supreme Court of Texas on January 2, 1975, and this application was dismissed for want of jurisdiction on February 26, 1975, without an opinion. Notice of appeal to the Supreme Court of the United States was filed in the Texas Court of Civil Appeals for the Tenth Supreme Judicial District on March 18, 1975. The jurisdiction of the Supreme Court of the United States to review the decision of the Texas Court of Civil Appeals is conferred by Title 28, U.S.C. Section 1257 (2). This appeal presents precisely the same question as to which the Supreme Court noted probable jurisdiction during its October Term, 1973, in *Exxon Corporation v. Jay M. Preston*, No. 73-232, on November 19, 1973, 414 U.S. 1038. After Exxon filed its brief in the Supreme Court on January 8, 1974, plaintiff-appellee Preston communicated to the Supreme Court, in an instrument styled "Express Waiver of Right to File Brief in Opposition," his agreement to change venue from Jefferson County to Harris County, as sought by Exxon. Thereafter, the

Supreme Court, on February 19, 1974, ordered that the prior judgment of the Court of Civil Appeals of Texas, Ninth Supreme Judicial District, affirming the trial court's overruling of Exxon's plea of privilege, be vacated, and that the cause be remanded for consideration of the question of mootness. On June 13, 1974, the Texas Court of Civil Appeals determined that the venue issue had indeed become moot, and the opinion of that Court is set forth in this Statement at Appendix B. The instant appeal effects the legal resurrection of this vitally important, substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute here involved is the general venue statute of the State of Texas, Tex. Rev. Civ. Stat. Ann. art. 1995 (1950), which provides in pertinent part:

> "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:
>
> * * * *
>
> "3. Non-residents; residence unknown. — If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.
>
> * * * *
>
> "23. Corporations and associations. — Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; *or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative.* Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the

> railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.
>
> * * * *
>
> "27. Foreign corporations. — *Foreign* corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, *or in any county where such company may have an agency or representative*, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside." (emphasis added)

Subdivision 27, which provides an alternative county for venue of suits against foreign corporations only, is the portion of the statute being challenged.

The provision of the United States Constitution here involved is the Equal Protection Clause of the Fourteenth Amendment.

QUESTION PRESENTED

Whether that portion of subdivision 27 of Article 1995 which allows a foreign corporation, authorized to do business in Texas, to be sued in *any* county where it has an agent or representative, without regard to where the plaintiff resided at the time his cause of action arose, is repugnant to the Equal Protection Clause of the Fourteenth Amendment, inasmuch as there is no rational basis for Texas' distinction for venue purposes between a foreign corporation author-

ized to do business in Texas and a domestic corporation, which, regardless of where it has an agent or representative, may only be sued in a county away from that of its residence or principal office upon proof under subdivision 23 that the plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellee, Starnes, a resident of McLennan County, Texas, filed suit in McLennan County against appellant, American Motorists Insurance Company, an Illinois corporation authorized to do business in Texas with its principal office in Dallas County, under the uninsured motorist provisions of a liability insurance policy issued to appellee by appellant. The automobile collision out of which this cause of action and appellee's damages arose occurred in Fort Worth, Tarrant County, Texas. Process was served, in accordance with Texas law, upon appellant's statutorily designated process agent, the Chairman of the State Board of Insurance at Austin, Travis County, Texas. Appellant filed a plea of privilege[1] to be sued in the county of its residence, Dallas County.[2] Appellee filed a controverting plea,[3]

[1] A plea of privilege is a verified pleading by which, under Texas practice, a defendant challenges the venue of a suit. Rule 86, Texas Rules of Civil Procedure.

[2] For purposes of Article 1995, "domicile" means residence, *Snyder v. Pitts*, 241 S.W. 2d 136 (Tex. 1951).

[3] A controverting plea is a verified pleading by which, under Texas practice, the plaintiff states specifically the grounds relied upon to confer venue under one or more of the subdivisions of Article 1995. Rule 86, Texas Rules of Civil Procedure.

asserting venue in McLennan County under both subdivisions 23 and 27, but at the hearing relied exclusively upon subdivision 27[4] and a stipulated showing that appellant was a foreign corporation transacting business in Texas and that it did have a local agent in McLennan County. Appellee was not required, nor did he attempt, to offer evidence as to any of the constituent elements of his cause of action during the course of the plea of privilege hearing. The trial court overruled appellant's plea of privilege. Appellant argued before the Texas Court of Civil Appeals, Tenth Supreme Judicial District, that subsection 27 is unconstitutionally discriminatory, because it permits a foreign corporation authorized to transact business in Texas to be venue bound without plaintiff's having to prove a cause of action, but only by proof of the existence within the venue county of defendant foreign corporation's agent, as compared with the requirement of subdivision 23, as construed by the Texas Courts,[5] that a Texas domestic corporation can be venue bound only upon

[4] Plaintiff's residence in the county wherein he filed this action is not material to the establishment of venue in such county under subdivision 27.

[5] Subdivision 23 requires that the plaintiff prove all the elements of his cause of action when he seeks thereunder to sue a domestic corporation away from its principal office or in a county other than where the cause of action arose. *Victoria Bank & Trust Co. v. Monteith*, 158 S.W. 2d 63, 66 (Tex. Comm'n App. 1941). In an uninsured motorists case, plaintiff must offer evidence establishing, by a preponderance of the evidence, both the making of the insurance contract and its breach, i.e., that the other vehicle was an "uninsured automobile" within the meaning of the policy, *Employers Casualty Co. v. Clark*, 491 S.W. 2d 661, (Tex. 1973), that the uninsured motorist was negligent upon the occasion in question, and that such negligence was a proximate cause of plaintiff's injuries.

proof of each and every element of the cause of action by a preponderance of the evidence. The Court of Civil Appeals, relying primarily upon what it deemed to be a prior authoritative holding of the Texas Supreme Court,[6] and declining an invitation to re-examine the question in the light of the United States Supreme Court's then recent orders in *Exxon Corporation v. Preston*, supra, affirmed the judgment of the trial court. Appellant then applied to the Texas Supreme Court for a writ of error, but that court dismissed appellant's writ of error for want of jurisdiction, thus presenting this Court with a viable, ripe, and extremely important constitutional issue that has not only created much conflict among the appellate courts of Texas (see Appendix C hereto) but has adversely affected, and continues to adversely affect, not only this appellee, but also many of the nation's largest corporations which transact business daily in Texas, under much the same degree of State supervision and control as Texas domestic corporations, but which are, for one reason or another, incorporated under the laws of another state.[7]

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[6] *Commercial Ins. Co. v. Adams*, 369 S.W. 2d 927 (Tex. 1963), refusing writ of error, 366 S.W. 2d 801 (Tex. Civ. App. 1963). [A copy of the Court of Civil Appeals' decision and the Supreme Court's per curiam decision are reproduced herein as Appendix C]

[7] Appendix C to the very comprehensive Statement filed in the United States Supreme Court in *Exxon Corporation v. Preston* contained information from authoritative sources to the effect that of the fifty largest corporations *headquartered* in Texas during 1972, only nine were domestic corporations.

THE QUESTION IS SUBSTANTIAL

Appellant is an Illinois corporation, organized for the purpose of conducting the business of insurance, and transacting business in Texas under a certificate of authority granted by the Texas State Board of Insurance Commissioners. Appellant secured its certificate of authority, and has conducted its business in Texas, under the same comprehensive regulatory scheme applicable to Texas domestic insurance corporations.[8] Moreover, in accordance with the Texas Insurance Code, appellant has designated the Chairman of the State Board of Insurance Commissioners as its duly authorized attorney in fact for the purpose of accepting service of process in any suit brought against it in any court of the State of Texas. Appellant's residence, for venue purposes, is its principal place of business, in Dallas County, Texas. Because appellant did not, for reasons of its own, initially acquire its corporate status within the State of Texas and under the laws of the State of Texas pertinent to insurance corporations, and for no other reason, it is denied the procedural and substantive safeguards that the Texas venue statute secures for Texas domestic corporations. The judgment of the court below, upholding the constitutionality of subdivision 27 of article 1995 over appellant's claim that it denies foreign corporations authorized to do business in Texas the equal protection of the laws, is in direct conflict with this Court's prior decision in *Power Mfg. Co. v. Saunders*, 274 US. 490 (1927). The sole issue presented in this appeal is whether a foreign corporation authorized to do business in a state may, for venue purposes, consistent with the Equal Protection Clause, be treated differently from

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[8] V.A.T.S. Insurance Code, Art. 21.43

a domestic corporation. *Saunders* holds that it may not.

In *Saunders*, this Court was confronted with an Arkansas venue statute which allowed foreign corporations, regardless of whether they were authorized to transact business in Arkansas, to be sued in any county of the State on a transitory cause of action, while domestic corporations could be sued only in counties in which they were doing business or were maintaining an office, officer or agent. Referring to foreign corporations authorized to do business in a state and having a fixed place of business and an authorized agent on whom process may be served, this Court held that "so far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals." 274 U.S. at 494. While the statutory scheme in Texas is different in several respects from the Arkansas statutes upon which this Court passed judgment in *Saunders*, these differences are not material to the instant appeal. It is the fact of different treatment, rather than the nature or extent of the difference, which offends the Equal Protection Clause. The Texas statute, article 1995, establishes broader venue, and different procedural and substantive treatment, for all foreign corporations, whether or not authorized to do business in Texas, than is provided for Texas domestic corporations.

Subdivision 27 of article 1995 allows suits against foreign corporations, including those, such as this appellant, who have secured specific authorization to conduct business in Texas in accordance with its laws, to be brought *inter alia* "in any county where such company may have an agency or representative." Under subdivision 23, however, suits against domestic

corporations may be brought outside the county where the cause of action arose or the county in which the company's principal office is located only upon proof by the plaintiff that the defendant corporation has an agency or representative in the county of suit *and* that plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

Because of the judicial engrafting of the requirement that a plaintiff prove each and every element of his cause of action, in order to sustain venue against a domestic corporation under subdivision 23, it is apparent that venue, *Texas style*, involves a number of practical, procedural considerations (not the least of which is discovery) over and above the matter of the geographical situs of a lawsuit.

Because subdivision 27 does not require a plaintiff to prove, by a preponderance of the evidence, the elements of his cause of action at the preliminary venue hearing, foreign corporations authorized to do business in Texas are deprived of a very valuable opportunity to obtain a virtual preview of plaintiff's case-in-chief, to cross-examine his witnesses, and to nip a frivolous or baseless claim in the bud, preventing it from developing into a cumbersome, time-consuming lawsuit. In view of the right of either party to demand that a jury determine the venue facts,[9] a defendant foreign corpo-

[9] *Merryman v. Zeleny*, 143 S.W. 2d 410 (Tex. Civ. App. 1940). Note: But if the jury is demanded by the defendant, the trial court may in its discretion require that the entire cause be tried on its merits at the same time. Rule 87, Texas Rules of Civil Procedure.

ration is also deprived of the opportunity to obtain a preliminary assessment by a jury of the plaintiff's credibility.

To place these procedural considerations within the context of the instant appeal, appellant's basic right to be sued in the county of its residence, i.e., principal place of business, was defeated by appellee without his having to make any showing of a cause of action against appellant. Were appellant a Texas domestic corporation, he would have been entitled to such a showing under subdivision 23.

The State of incorporation is the only difference between appellant and its counterparts who are Texas domestic corporations. They all are subject to the Texas Insurance Code, secure the same certificate of authority from the State Board of Insurance, sell policies the form and substance of which have been reviewed and approved by the Board, and conduct their Texas business activities under the supervision of the Board. Given the above similarities, there is no rational justification for treating any[10] foreign corporation authorized to do business in Texas differently, for venue purposes, from its domestic corporate counterpart. The ultimate test of the validity of subdivision 27 is not whether foreign corporations selling insurance (or doing any other lawful business) in Texas differ from their domestic counterparts, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Metropolitan Casualty Insurance Co. of New York v. Brownell*, 294 U.S.580 (1935).

[10] The *Texas Business Corporation Act*, although not applicable to corporations organized for the purpose of conducting the business of insurance, does place foreign corporations authorized to do business in Texas under the same, or substantially similar, controls as those applicable to Texas domestic corporations.

It is submitted that the classification created by subdivisions 23 and 27 of the Texas venue statute, to the extent that it arbitrarily discriminates between foreign corporations authorized to do business in Texas and domestic corporations, is totally without justification. Almost fifty years have elapsed since *Saunders*. Today, foreign corporations who have taken affirmative action to secure specific authorization from a state to conduct business within its borders are subject to considerably more stringent controls than they were when this Court first condemned the same kind of classification with which appellant is confronted. There is absolutely no constitutionally permissible basis for classifying them differently as to venue.

The only justifications ever advanced by the appellate courts of Texas for treating a foreign corporation authorized to do business in Texas differently, for venue purposes, from a domestic corporation, are set forth in the *Adams* case (see Appendix C hereto). They all fail to sustain the classification because they either concern matters not pertinent to venue (such as service of process) or they simply fail to recognize or appreciate the very comprehensive controls which Texas State agencies (in the case of this appellant, the State Board of Insurance) exercise over those foreign corporations who voluntarily submit to these controls in conjunction with their acquisition of certificates of authority. To arbitrarily lump all foreign corporations together, regardless of whether they have

secured authorization to do business in Texas, is patently illogical. This is the fly in the ointment of the Texas venue statute.

The great majority of the largest corporations doing business in Texas, and those making no small contribution to its welfare, were incorporated in Delaware. The great majority of corporations engaged in the business of insurance in Texas were incorporated elsewhere. These so-called "foreign" corporations, who have secured specific authorization to do business in Texas, and thereby subjected themselves to much the same effective controls that govern Texas domestic corporations, have established their principal offices in Texas and made substantial capital investments incident to Texas enterprises. It is strangely ironic that Texas continues to treat such authorized foreign corporations as if they were "fly-by-night" operatives, against whom any aggrieved Texan could initiate legal proceedings in any county where he could "find" a company agent.

Subdivision 27 is clearly repugnant to the Fourteenth Amendment. Not only does it provide broader venue in suits against authorized foreign corporations than that provided by subdivision 23 for suits against domestic corporations, but it deprives foreign corporations of the right to require proof by a plaintiff of each element of his cause of action in order to sustain venue in a county away from the corporation's principal office.

The question presented by this appeal is substantial. It is ripe for decision. Given the symmetry of State control over both domestic and authorized foreign corporations with respect to their Texas enterprises,

Saunders would shudder at such arbitrary classification as Texas presently continues to enforce with respect to venue.

Respectfully submitted,

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HOFFMAN & RUSSELL
SHEEHY, LOVELACE & MAYFIELD

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of May, 1975, three copies of the foregoing Jurisdictional Statement were mailed, postage prepaid, to Fred Horner, Dunnam, Dunnam & Dunnam, 4125 West Waco Drive, Waco, Texas 76710, attorneys for appellee. I further certify that all parties required to be served have been served.

. . . . . .
Joel W. Westbrook

Appendix A

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,
v.
Virgil B. STARNES, Appellee.
No. 5362.
Court of Civil Appeals of Texas,
Waco.
Oct. 17, 1974.
Rehearing Denied Nov. 21, 1974.

McDONALD, Chief Justice.

This is a venue case involving Subdivision 27, Article 1995 Vernon's Ann.Tex.Civ.St.

Plaintiff Starnes sued defendant Insurance Company in McLennan County. Defendant filed plea of privilege to be sued in Dallas County. Plaintiff controverted asserting venue in McLennan County under Subdivision 27.

It was stipulated defendant was a foreign corporation transacting business in Texas, and that it had a local agent in McLennan County.

The trial court overruled defendant's plea of privilege.

Defendant appeals on one point: "The trial court erred in holding that venue in McLennan County was established under Subdivision 27, V.A.T.S. 1995 by a limited showing that defendant was a foreign corporation with a local recording agent in McLennan County".

Defendant asserts the question here is whether or not Subdivision 27 is unconstitutionally discriminatory because it permits a foreign corporation to be venue bound without proving a cause of action, but only by proof of the existence within the venue county of defendant foreign corporation's agent as compared with the requirement that a Texas domestic corporation can be venue bound under Subdivision 23 only if the existence of a cause of action is demonstrated.

The question has been decided adversely to defendant by our Texas Supreme Court in *Commercial Ins. Co. of Newark, New Jersey v. Adams*, S.Ct., 369 S.W.2d 927; and holds that exception 27, Article 1995 is not void and unconstitutional under the 14th Amendment to the United States Constitution as affording a wider venue action against foreign corporations than is afforded against domestic corporations under Section 23 of the same Article. To the same effect are *Great American Ins. Co. v. Sharpstown State Bank* (Tex.Civ. App. Austin) W/E Dismd., 422 S.W.2d 787; *Reliance Ins. Co. v. Falknor*, (Tex.Civ.App. Houston 1st) NRE, 492 S.W.2d 721; and *National Life and Accident Ins. Co. v. Notter*, (Tex.Civ.App. Waco) W/E Dismd., 455 S.W.2d 322. In *Notter*, the United States Supreme Court on March 22, 1971 "dismissed appeal for want of jurisdiction", and "denied petition for writ of certiorari", 401 U.S. 969, 91 S.Ct. 1196, 28 L.Ed.2d 319.

Defendant urges that in *Humble Oil & Refining Co. (Exxon Corp. Successor) v. Preston*, (Tex.Civ.App. Beaumont) W/E Dismd., 437 S.W.2d 956, presenting the question, the U.S. Supreme Court noted "probable jurisdiction", 414 U.S. 1038, 94 S.Ct. 538, 38 L.Ed.2d 328, that thereafter appellee advised the U.S. Supreme

Court he no longer opposed change of venue; and that court then remanded the case to the Beaumont Court of Civil Appeals to consider whether the venue issue was moot, 415 U.S. 904, 94 S.Ct. 1394, 39 L. Ed2d 459, and that we should reexamine the question and declare Subdivision 27 unconstitutional; See also *Humble Oil & Refining Co. (Exxon Corp. Successor) v. Preston*, Beaumont Tex.Civ.App., NWH, – S.W.2d –. (dated June 13, 1974).

Since the U.S. Supreme Court dismissed appeal and denied writ of certiorari in *Notter*, supra, presenting the same question in March, 1971, we adhere to our holding in *Notter*, and the Texas Supreme Court in *Adams*, supra.

Defendant's point is overruled.

Affirmed.

COURT OF CIVIL APPEALS

TENTH SUPREME JUDICIAL DISTRICT

P.O. BOX 1606

WACO, TEXAS 76703

R. I. GAGE, CLERK
PEARL REUWER, DEPUTY CLERK

November 21, 1974

FRANK G. McDONALD, CHIEF JUSTICE
VIC HALL, ASSOCIATE JUSTICE
JOHN A. JAMES, JR., ASSOCIATE JUSTICE

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RE: Cause No. 5362
American Motorists Ins. Co. v.
Virgil B. Starnes

from McLennan County

Gentlemen:

You are notified that the Appellant's Motion for Rehearing in the above cause was this day

OVERRULED

in the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, at Waco.

Yours truly,

R. I. GAGE, Clerk

By:
Pearl Reuwer, Deputy

CLERK'S OFFICE — SUPREME COURT

Austin, Texas, Feb. 26, 1975

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of AMERICAN MOTORISTS INS. CO. v. STARNES, No. B-4994 was this day dismissed for want of jurisdiction.

Very truly yours,

GARSON R. JACKSON, Clerk

No. 5362

IN THE COURT OF CIVIL APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT WACO, TEXAS

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant

VS.

VIRGIL B. STARNES,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Now comes American Motorists Insurance Company and files this its Notice of Appeal to the Supreme Court of the United States and in this regard would show the following:

1.

October 17, 1974, this honorable Court affirmed the order of the trial court of which order American Motorists Insurance Company had appealed to this Court. American Motorists Insurance Company's motion for rehearing was denied on November 21, 1974 and its application for Writ of Error to the Supreme Court of Texas was dismissed for want of jurisdiction on February 26, 1975.

2.

American Motorists Insurance Company hereby gives notice of appeal to the Supreme Court of the United States under Title 28, United States Code, Sec. 1257(2).

Respectfully submitted,
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By /S/
Philip E. McCleery
ATTORNEYS FOR
AMERICAN MOTORISTS
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was on this the 14th day of March, 1975, forwarded by prepaid United States certified mail, return receipt requested, to Mr. Fred Horner, DUNNAM, DUNNAM & DUNNAM, 4125 West Waco Drive, Waco, Texas, 76710, Attorneys for Virgil B. Starnes.

/S/
Philip E. McCleery

Appendix B

FILED

JUN 13 1974

ELIZABETH LeBLANC, CLERK,
COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

NO. 7395

HUMBLE OIL & REFINING COMPANY
(EXXON CORPORATION, SUCCESSOR)
Appellant,

v.

JAY M. PRESTON, Appellee

Pursuant to the mandate of the Supreme Court of the United States, we reconsider our prior judgment wherein the supporting opinion is reported in 487 S.W.2d 956. After the writ of error had been dismissed by the Supreme Court of Texas, Exxon appealed to the Supreme Court of the United States and that court noted probable jurisdiction. 414 U.S. 1038, 38 L.Ed.2d 328, 94 S.Ct. 538 (1973). Thereafter, plaintiff filed his motion in the District Court of Jefferson County, from which this case was appealed, seeking for the first time to "withdraw" his opposition to Exxon's plea of privilege. Without stating any reason therefor, the trial court overruled the motion, the order being entered on December 27, 1973.

Exxon filed its brief in the Supreme Court of the

United States on January 8, 1974, at which time the only remaining steps in the appeal were (a) the filing of plaintiff's brief, (b) oral argument, and (c) the announcement of the decision. These final steps were not taken because, on January 23, 1974, plaintiff filed an instrument in the Supreme Court styled "Express Waiver of Right to File Brief in Opposition" wherein he recounted his efforts to persuade Judge Clayton to permit the withdrawal of his opposition to Exxon's plea of privilege. Plaintiff averred his agreement "to change venue from Jefferson County to Harris County", as sought by Exxon, and contended that such action on his part had rendered moot the challenge to the constitutionality of *subdivision 27, Art. 1995, V.A.C.S.*

Thereafter, the Supreme Court of the United States vacated the judgment of this court and remanded the cause for consideration of the question of mootness, the order reading in part as follows:

> "ON CONSIDERATION WHEREOF, it was ordered and adjudged on February 19, 1974, by this Court that upon receiving and filing the appellee's (plaintiff's) waiver of right to file an opposing brief with his representation that he no longer opposes the change of venue of the litigation to Harris County, Texas, judgment of the said Court of Civil Appeals in this cause be vacated with costs, and that this cause be remanded to the Court of Civil Appeals of the State of Texas, Ninth Supreme Judicial District, *to consider whether the venue issue has become moot.*" (U.S. ,39 L.Ed.2d 459, 94 S.Ct. 1394 (1974); emphasis supplied)

We directed the filing of briefs confined to the question of mootness and have been favored with a brief by Exxon contending that the issue is viable and not moot. Plaintiff filed no brief, contenting himself with the filing of an instrument wherein "he expressly waives his right to file a Brief in response to Appellant's Brief filed herein on April 8, 1974."

We do not recount the factual structure of this case because on remand our Court must follow the rule so well stated in *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960):

> "When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself, and even upon such restoration, the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned to our consideration by the Supreme Court.
>
> "In the instant case, this Court is functioning under such a remand. Consequently, our jurisdiction is strictly limited by the Supreme Court's mandate. That mandate is our compass and our guide."

Under Texas law, venue rulings acquire the same finality as judgments on the merits. *Wichita Falls & S. R. Co. v. McDonald*, 141 Tex. 555, 174 S.W.2d 951, 952 (1943); *Williams v. Pitts*, 151 Tex. 408, 251 S.W.2d 148, 149-150 (1952). However, the power of the trial court to try the case on the merits is not suspended during the pendency of an appeal from an order overruling the plea of privilege. *Allen v. Wood-*

ward, 111 Tex. 457, 239 S.W. 602, 22 A.L.R. 1253 (1922); *Ex parte Scott*, 133 Tex. 1, 123 S.W.2d 306, 310 (1939); *Smith v. Crockett Production Credit Association*, 372 S.W.2d 956, 959 (Tex.Civ.App., Houston, 1963, error ref. n.r.e.).

Thus, even while the venue ruling is upon appeal, the trial court retains the basic lawsuit for trial on the merits and, upon an appropriate motion by the plaintiff, may grant a nonsuit of the entire case. Unquestionably, had plaintiff made such a motion in the trial court, the venue appeal would have become moot. *McNeill v. Hubert*, 119 Tex. 18, 23 S.W.2d 331 (1930). See also, *Slaughter v. Carter*, 410 S.W.2d 496 (Tex.Civ.App., Waco, 1966, no writ), and cases therein cited.

Plaintiff made no such motion in the trial court for a very obvious reason: his cause of action, upon refiling, would have been barred by the two-year statute of limitation, *Art. 5526, V.A.C.S.*

As presented originally by the pleadings in the trial and the appellate courts, the ultimate issue in this cause was simply venue: Where was the case going to be heard on the merits? – in Harris County or Jefferson County? Had Exxon succeeded at any level in the judicial hierarchy, the most favorable *judgment* which it could have procured was one ordering venue of the cause transferred from Beaumont to Houston. Plaintiff now agrees to such a transfer but, understandably, Exxon is unwilling to accept this Pyrrhic victory when it was so close to the ultimate and definitive solution to the serious constitutional question which it had urged upon the Courts of Texas.

Exxon, contending the case is not moot, would continue its constitutional challenge of *subdivision 27* in

the hope of achieving its avowed goal of having it declared repugnant to the Constitution of the United States. But, such a challenge must await another case and another day for, as Chief Justice Hickman, in *Tigner v. First Nat. Bank of Angleton*, 153 Tex. 69, 264 S.W.2d 85, 88 (1954), quoting from a text, said:

> " 'One of the most firmly established doctrines in the field of constitutional law is to the effect that a court will pass upon the constitutionality of a law only when necessary to the determination upon the merits of the cause under consideration. The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in the manner of an academic discussion.' "

The same rule is applicable in the federal court system. As was said in *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, 678 (1962):

> "A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y. & P.S.S. Co. v Emigration Comrs. 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 532."

There is no present actual controversy between the parties as to the controlling question before this court – venue of plaintiff's cause of action against Exxon. Thus, we answer the question specifically consigned to this court: The venue issue has become moot. Cf. *Connell v. B. L. McFarland Drilling Co.*, 162 Tex. 345, 347 S.W.2d 565, 567 (1961).

Having determined that the case has become moot while upon appeal, we are now faced with a procedural problem stemming from the inapplicability of the usual rule which is stated in *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863 (1943): "When a cause becomes moot on appeal, all previous orders and judgments should be set aside and the cause, not merely the appeal, dismissed." (citations omitted) See also, *Texas Foundries, Inc. v. International Moulders & Foundry Worker's Union*, 151 Tex. 239, 248 S.W.2d 460 (1952); *Guajardo v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725 (1958); *Blanton v. City of Houston*, 163 Tex. 224, 353 S.W.2d 412 (1962); *Lund v. Alanis*, 384 S.W.2d 123 (Tex. 1964).

Obviously, our compliance with this generally prevailing rule would deny to Exxon even the limited relief to which it is entitled under the concession of plaintiff which resulted in aborting the appeal. However, in our effort to fashion a remedy to meet this unusual situation, we must bear in mind another equally well-established rule: An errorless judgment may not be reversed in the interest of justice. See, e.g., *City of Houston v. Blackbird*, 394 S.W.2d 159, 165 (Tex. 1965); *Barnum v. Lopez*, 471 S.W.2d 567, 568 (Tex. 1971); *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 213 S.W.2d 530, 535 (1948). And, as we pointed out on original submission of this cause, the trial court committed no error, *under the prevailing law of this state*, when it overruled the plea of privilege. There has been no change in the law since that opinion was handed down.

In order to place our problem in proper perspective, it is well to recapitulate the procedural morass in

which we are now embedded: (1) We have a case which has become moot while upon appeal, at the instance of the appellee and without fault on the part of the appellant; yet, we cannot take the usual steps to dispose of the cause. (2) The judgment of the trial court on the venue issue has now become final and the only relief which the trial court could grant would be the entry of a judgment of dismissal upon plaintiff's motion for leave to take a nonsuit; yet, this would deny plaintiff a trial on the merits. (3) We review an errorless judgment and the usual rules prohibit us from reversing an errorless judgment.

Our research has not disclosed controlling authority which directs the only just result which we may reach in the disposition of this case – its transfer to Harris County for trial on the merits. Under these circumstances, we must attempt to attain the objective of *Rule 1, T.R.C.P.* – "a just, fair, equitable and impartial adjudication of the rights of litigants . . . ."

We can accomplish this, and confer upon Exxon the right to litigate the merits of plaintiff's cause of action in Harris County *only* by exercising jurisdiction to transfer this cause, notwithstanding our determination that the appeal is moot. We do so in the interest of justice upon the basis of plaintiff's concession noted above. Such an order will be entered as the judgment of this Court.*/

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*/ Justice Roberts, dissenting in *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 88 L.Ed. 987, 1000 (1944), characterized a judgment of that Court as being of the "same class as a restricted railroad ticket, good for this day and train only." Such comment may very well be addressed to our holding today.

There yet remains the adjudication of costs of court, and we note that the Supreme Court of the United States has already adjudicated costs in that Court – "that Exxon Corporation recover from Jay M. Preston One Hundred and Fifty Dollars ($150) for its costs herein expended." The Clerk of that Court has advised that the costs adjudged against plaintiff "may be collected through the Court of Civil Appeals of Texas, Ninth Supreme Judicial District or direct from opposing counsel or parties." We now assess costs of this venue appeal in all courts, including the Supreme Court of the United States, against the plaintiff. *Rule 448.*

Therefore, pursuant to the prayer of Exxon Corpoartion contained in its plea of privilege, consistent with the concession of the plaintiff, and in the interest of justice, the judgment of the trial court is now REVERSED and the judgment RENDERED transferring this cause to one of the District Courts of Harris County, Texas, for trial upon the merits.

REVERSED and RENDERED.

Opinion delivered
June 13, 1974

Quentin Keith
Associate Justice

Appendix C

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
Appellant,
v.
JOHN Q. ADAMS, Appellee.
No. 14085.
Court of Civil Appeals of Texas.
Houston.
April 4, 1963.
Rehearing Denied April 25, 1963.

COLEMAN, Justice.

This is an appeal from an order of the trial court overruling a plea of privilege. The principal question involved is the constitutionality of Subd. 27, Article 1995, Revised Civil Statutes of Texas.

Appellant is a foreign corporation with its residence and principal place of business in Dallas County, Texas. The corporation is engaged in doing business in Harris County, Texas, and has an agent, a representative and an office in that County. Appellee filed suit in Harris County, Texas and, in a controverting affidavit to appellant's plea of privilege, alleged as exceptions to exclusive venue in the county of one's residence, Subdivisions 5, 23, 27 and 28 of Article 1995, R.C.S.

Appellee failed to introduce evidence to sustain venue in Harris County under Subdivisions 5 and 28. The judgment of the trial court cannot be sustained by reason of the Amendment to the United States Constitution as affording provisions of either of those subdivisions.

[1] Appellant contends that exception 27 of Article 1995, R.C.S., is void and unconstitutional under the

14th Amendment to the United States Constitution as affording a wider venue for actions against foreign corporations than is afforded against domestic corporations under Section 23 of Article 1995, R.C.S. Prior to 1943 the provisions of our statutes relating to venue for foreign corporations were substantially the same as for domestic corporations. Acts 1874, 14th Legislature, G.L., Vol. 8, Ch. 34, p. 32; subd. 21, Art. 1198, Rev.Civ. Statutes of Texas, 1879; Acts of 19th Legislature, 1885, G.L., Vol. 9, p. 699; Fireman's Fund Insurance Company v. McDaniel, Tex.Civ.App., 327 S.W.2d 358, Grayburg Oil Co. v. Powell, 118 Tex. 354, 15 S.W.2d 542.

In 1943, Subd. 23 of Art. 1995, R.C.S. was amended and now provides:

"Corporations and Associations. — Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any count through or into which the railroad of such corporation extends or is operated.

Suits against receivers of persons and corporations may also be brought as otherwise provided by law."

Subdivision 27 reads as follows:

"Foreign corporation. — Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside."

In Fireman's Fund Insurance Company v. McDaniel, supra, the Court of Civil Appeals at Beaumont in a carefully written opinion reviewing the applicable decisions held:

> "We first note some of the inequalities in the administration of the two venue exceptions even where the terms are similar. As was held in Victoria Bank & Trust Co. v. Monteith, 138 Tex. 216, 158 S.W.2d 63, and Rogers v. Fort Worth Poultry & Egg Co., Tex. Civ.App., 185 S.W.2d 165, for a plaintiff to maintain venue against a defendant domestic corporation outside of the county where its principal office is located under Exception 23, he must prove a cause of action by the preponderance of the evidence on the venue hearing. It is not sufficient under that exception to make mere prima facie proof of a cause of action. But under the part of Exception 27 here referred to, he would not need to make any proof whatever of any cause of

action at the venue hearing. Southwestern Greyhound Lines v. Day, Tex.Civ.App., 238 S.W.2d 258. A foreign corporation may be sued in any county where it has an agency or representative, without reference to the plaintiff's county of residence, and without reference to whether the suit is substantial enough that a cause of action could actually be proved upon the venue hearing.

"* * * The Saunders decision, Power Mfg. Co. v. Saunders, 1927, 274 U.S. 490, 47 S.Ct. 678, 679, 71 L.Ed. 1165, appears to be a culmination of a series of cases since the Greene case (Southern R. Co. v. Greene, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536) extending the equal protection clause to foreign corporations and we believe it to be decisive of the constitutional question before us.

* * * *

"We accordingly hold Sub. 27 of Art. 1995, Vernon's Ann.Civil Statutes of Texas, as amended, to be unconstitutional under the 14th Amendment to the United States Constitution as it relates to the venue of suits against foreign corporations of Fireman's Funds status to the extent that it conflicts with the provisions of Sub. 23 of Art. 1995, as amended, by Acts 1943, 48 Leg."

[2] This decision was cited as controlling by the Court of Civil Appeals at Eastland in Maryland Casualty Company v. Frank M. Torrez, 359 S. W.2d 559. An application for a writ of error in this case was dismissed by the Supreme Court of Texas for want of jurisdiction by written opinion, in which the Court pointed out: "We should not be understood as implying that said subdivision 27 is unconstitutional or that the contrary is true." Torrez v. Maryland Casualty Co., 363 S.W.2d 235 (Tex.Sup.). This Court, therefore,

must determine the question of the constitutionality of Subdivision 27 after consideration of all the pertinent authorities.

In 1904 the Supreme Court of the United States decided the case of Cincinnati Street Railway Co. v. Snell, 193 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604. An Ohio statute provided:

> "When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

There is no statute giving the corporation the right to a change of venue. It was contended that this constituted discrimination denying equal protection of the law in violation of the 14th Amendment to the Constitution of the United States. The Court upheld the constitutionality of the act, saying:

> "The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the 14th Amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the

same and equal laws are applicable and administered. But it is fundamental rights which the 14th Amendment, safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."

However, in Power Mfg. Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165 (1927), the Supreme Court declared unconstitutional a statute of the State of Arkansas allowing a suit for personal injuries against a foreign corporation to be brought in any county of the state, where actions of the same character, if against a domestic corporation, had to be brought in a county where it had a place of business or in which its chief officer resided, and, if against a natural person, in a county where he resided or could be found. The basis for the decision is found in this quotation:

> "The clause in the Fourteenth Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (Truax v. Corrigan, 257 U.S. 312, 333, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375; Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg, 238 U.S. 56, 59, 35 S.Ct. 675, 59 L.Ed. 1199, L.R.A. 1915E 953), and extends as

well to corporate as to natural persons (Smyth v. Ames, 169 U.S. 466, 522, 18 S.Ct. 418, 42 L.Ed. 819; Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154, 17 S.Ct. 255, 41 L.Ed. 666; Santa Clara County v. Southern Pacific R.R. Co. 118 US. 394, 396, 6 S.Ct. 1132, 30 L.Ed. 118). It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection but it does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. Truax v. Corrigan, supra, page 337 (42 S.Ct. 131); Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, supra, 155 (17 S.Ct. 256); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.E.. 369, Ann.Cas. 1912C, 160; Ft Smith Light & Power Co. v. Board of Improvement (May 16, 1927) 274 U.S. 387, 47 S.Ct. 595, 71 L.Ed. 1112.

> "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible; the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.
>
> "Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. *The statutes mean foreign corporations doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent*

on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions, it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary." (Emphasis added)

Justices Holmes and Brandeis dissented.

In Bain Peanut Co. of Texas et al v. Pinson et al, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482 (1931), opinion by Mr. Justice Holmes, the Court upheld the constitutionality of Subd. 23, Art. 1995, R.C.S. of Texas, in a case where the question was raised as to whether the statute allowing suits against private corporations to be brought in any county in which the cause of action arose was valid under the 14th Amendment to the Constitution of the United States when unincorporated individuals were not subject to such suits outside the county of their residence. The Court, relying on Cincinnati Street Railway v. Snell, supra, said:

"In deciding whether a corporation is denied the

equal protection of the laws when its creator establishes a more extensive venue for actions against it than are fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not alleged or proved here. Louisville & Nashville R. Co. v. Barger Asphalt Paving Co., 197 U.S. 430, 434, 25 S.Ct. 466, 49 L.Ed. 819; Pastone v. Pennsylvania, 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539. This it is for the corporation to make out. The range of the State's discretion is large. * * * The question seems to be answered by Cincinnati Street Ry. Co. v. Snell, 193 U.S. 30, 36, 37, 24 S.Ct. 319, 48 L.Ed. 604, which lays down that if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded. But without asserting a universal proposition it is obvious that there is likely to be such a difference between the business done by a corporation and that done by a private person that the State well may take it into account when it permits a corporation to be formed."

In Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070, the Court considered an Indiana statute invalidating provisions in insurance policies issued by foreign insurance companies limiting time for suits thereon to less than three years. There was no similar legislation applicable to domestic insurance companies. The Supreme Court held that the legislation did not infringe the 14th Amendment, saying:

"The equal protection clause does not prohibit

legislative classification and the imposition of statutory restraints on one class which are not imposed on another. But this Court has said that not every legislative discrimination between foreign and domestic corporations is permissible merely because they differ, and that with respect to some subjects of legislation the differences between them may afford no reasonable basis for the imposition of a statutory restriction upon foreign corporations, not applied to domestic corporations. The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. Power Mfg. Co. v. Saunders, supra, 274 U.S. 494, 47 S.Ct. 678, 71 L.Ed. 1165. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. Washington ex rel. Bond & Goodwin & Tucker, Inc., v. Superior Court, 289 U.S. 361, 366, 53 S.Ct. 624, 77 L.Ed. 1256, 89 A.L.R. 653, National Union Fire Insurance Co. v. Wanberg, 260 U.S. 71, 75, 43 S.Ct. 32, 67 L.Ed. 136. See State of Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 396, 47 S.Ct. 630, 71 L.Ed. 1115.

* * * * *

"It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as

> the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455; State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 537, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464."

Four Justices dissented, citing, among other cases, Power Manufacturing Company v. Saunders, supra, for the proposition that the statute contravened the equal protection clause of the 14th Amendment.

In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 2d 480, the Court refused to strike down legislation of the State of Ohio taxing merchandise belonging to a domestic corporation held in storage warehouses for storage only, where merchandise belonging to non-residents similarly held was exempted from the tax. In discussing whether the discrimination involved in this legislation violated the Equal Protection Clause of the 14th Amendment, the Court said:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' * * * 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' * * * That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrim-

ination is founded upon a reasonable distinction, or difference in a state policy. * * *

"* * * Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. * * *"

[3] From these cases it is evident that not all discrimination is prohibited by the Equal Protection Clause of the 14th Amendment, and that a determination of whether a statute which discriminates between classes is unconstitutional requires the consideration of: (1) whether the difference does injustice to the class generally in that the same and equal laws are not applicable and administered in the forum provided; and (2) whether the difference is pertinent to the subject with respect to which the classification is made; and (3) whether the discrimination is founded upon any reasonable distinction or difference in state policy.

That provision of Subd. 27 allowing venue against a foreign corporation in any county where it has an agency or representative is not comparable to that provision of Subd. 23 permitting the plaintiff to sue a domestic corporation in the county of his residence at the time the cause of action accrued if the corporation maintained an agency or representative there, or, if no agency or representative is found in such county, then in the nearest county where such a representative or agency can be found. This particular exception was no doubt inserted to permit a plaintiff to have the benefit of a trial in or near his home county, and appears to be fair and reasonable since the requirement that the defendant maintain an agency or representative in the

county insures that the county of trial is one where the corporation is known and with which the corporation is familiar. The foreign corporation as a plaintiff receives the benefit of the provision and therefore suffers no discrimination.

The difference, which constitutes discrimination, lies in the absence of a provision in Subd. 23 permitting suit against a domestic corporation in certain counties where it maintains an agency or representative, while Subd. 27 allows suit against foreign corporations in all such counties.

[4] There is no contention that the same and equal laws are not applicable and administered in all counties of Texas. Subdivision 27 applies to all foreign corporations. It is a matter of common knowledge that many foreign corporations do business in this state without taking advantage of the laws of this state authorizing them to do business in Texas and subjecting them to regulation. It would be difficult, if not impossible, for a plaintiff to ascertain the principal office of a foreign corporation not authorized to do business in this state. A foreign corporation qualified to do business in this state may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical. Competitive factors would dictate that its principal office be located where it intends to conduct its business. Thus the foreign corporation is favored over the domestic concern when it is permitted to choose any city as its principal place of business.

There is little doubt that the difficulty of securing service on foreign corporations was a factor inducing the legislature to provide a wide venue for actions against them. The caption of Senate Bill No. 126, enacted into law by the 19th Legislature and approved by the Governor on March 31, 1885, provided:

> "An act prescribing and fixing the venue of suits against foreign corporations, joint stock companies or associations, or acting corporations or associations, doing business within this state, and to provide the mode of serving process on such corporations or associations."

The act consisted of two sections. The first was substantially the same as our present Subdivision 27 and the second provided the method of obtaining service, including service of process on "any local agent within this state."

The degree of effective control which the state may exercise over domestic corporations as opposed to foreign corporations in general justifies the classification adopted by the state legislature. The state policy in this respect is not so arbitrary as to be unconstitutional. As regards foreign corporations submitting to a certain degree of control by qualifying to do business in the state, the justification is less evident, but nevertheless the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations. The quotation from Justice Holmes' opinion in the Bain Peanut case, supra, is apt in this connection. In that opinion he also pointed out: "The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a

little play in its joints." Bain Peanut Co. of Texas v. Pinson, supra.

[5, 6] It could well be that the legislature had in mind spreading litigation involving foreign corporations among the various courts of the state in order to avoid the possibility of increasing the congested condition of the dockets of the metropolitan courts. Other possibilities could be explored, but, as was pointed out by the Supreme Court of the United States in Metropolitan Casualty Insurance Company of New York v. Brownell, supra, "A statutory discrimination will not be set aside * * * if any state of facts reasonably may be conceived to justify it." The burden of proving unconstitutionality of this statute rests on appellant more heavily in view of the fact that the act attacked was undoubtedly constitutional when enacted and the question of its legality at this time arises, not by reason of a change in its provisions, but by reason of the enactment of a statute amending Section 23, and not because discriminatory burdens have been placed on foreign corporations, but because the same burden has been removed from domestic corporations.

The highest courts of several states have considered similar statutes and have upheld them as being valid. Lloyd Adams, Inc. v. Liberty Mutual Insurance Co., 190 Ga. 633, 10 S.E.2d 46 (1940); Conner v. Willet, 265 Ala. 319, 91 So.2d 225 (1956); Long v. General Petroleum Co. of California, 11 Cal.App.2d 708, 54 P.2d 1147 (1936); Wilson and Company, Inc. v. Hickey, 186 Okl. 324, 97 P.2d 564 (1939).

In Fireman's Fund Insurance Company v. McDaniel, supra, the Court of Civil Appeals said: "In view of the holding in the Saunders case, however, we believe that

to point to the discrimination effected by Subd. 27 of our statute in the circumstances, is to prove it unreasonable and arbitrary as a matter of law." In spite of our great respect for the ability and learning of that court and of the Eastland Court of Civil Appeals, we are unable to agree. In the Saunders case the statute under consideration placed venue in any county in the state without regard to whether the corporation maintained an agent or representative there. In addition, as construed by the court, the statute applied only to foreign corporations who had a permit to do business in the state. Under such circumstances the actual decision in the Saunders case would not be controlling as to the legality of the Texas law. The holding of the Saunders case has been weakened by the decision of the Bain Peanut case reaffirming the Cincinnati Street Railway case, and by the subsequent decisions of the United States Supreme Court previously cited.

Appellee proved that appellant was a foreign corporation; that it was doing business in Texas; and that it had an agent and representative in Harris County, Texas. These facts appearing, the trial court was correct in sustaining venue in Harris County, Texas. We, therefore, find it unnecessary to determine whether exception 23 applies to foreign corporations or whether the facts proved would sustain venue in Harris County under such Subdivision.

The judgment of the trial court is affirmed.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY, Petitioner,

v.

JOHN Q. ADAMS, Respondent.

No. A-9630.

Supreme Court of Texas.

July 17, 1963.

Rehearing Denied July 31, 1963.

PER CURIAM.

The Houston Court of Civil Appeals in this case has held that exception 27 of Art. 1995, Vernon's Ann.Civ. Stat., is not void and unconstitutional under the 14th Amendment to the United States Constitution as affording a wider venue for action against foreign corporations than is afforded against domestic corporations under Section 23 of the same article. 366 S.W.2d 801. This holding is in conflict with the holding of the Beaumont Court of Civil Appeals in Fireman's Fund Insurance Co. v. McDaniel et al., Tex.Civ.App., 327 S.W.2d 358, and with that of the Eastland Court of Civil Appeals in Maryland Casualty Co. v. Torrez, Tex.Civ.App., 359 S.W.2d 559.[1]

We are in agreement with the decision of the Houston Court of Civil Appeals in this case. The writ of error is accordingly refused. Rule 483, Rules of Civil Procedure.

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[1] Writ of error dismissed for want of jurisdiction. Torrez v. Maryland Casualty Company, Tex., 363 S.W.2d 235.